

YSL

No. 36134-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PHYLLIS BONDURANT

Appellant.

Lewis County Superior Court

Cause No. 06-1-00365-3

The Honorable Judge Nelson E. Hunt

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR
345 W. MAIN STREET, 2ND FLOOR
CHEHALIS, WA 98532
360-740-1240

by:

Lori Smith

Lori Smith, Deputy Prosecutor

PM 11-26-07

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BUT EVEN IF THE PROSECUTOR ASKED AN IMPROPER QUESTION, ANY ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE IN THIS CASE.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudicial. State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). The defendant bears the burden of showing the improper conduct as well as its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). Prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). The reviewing court will review the trial testimony in its entirety to make this determination. State v. Walden, 69 Wn.App. 183, 187, 847 P.2d 956 (1995). If there was no proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a

prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have prevented the resulting prejudice. State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). "Cross examination designed to compel a witness to express an opinion as to whether other witnesses were lying constitutes misconduct." State v. Stover, 67 Wn.App. 228, 230, 834 P.2d 671 (1992), review denied, 120 Wn.2d 1025, 847 P.2d 480 (1993). But a prosecutor's remarks are not grounds for reversal if they were invited or provoked by defense counsel or are a relevant reply to defense counsel's arguments and are not so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995); State v. Carver, 122 Wn.App. 300, 306, 93 P.3d 947 (2004). Moreover, if the prejudice could have been cured by a jury instruction but the defense did not request one, reversal is not required. State v.

Dhaliwal 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Fiallo-Lopez, 78 Wn.App. 717, 726, 899 P.2d 1294 (1995). Additionally, "the absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d at 661; State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (2993), rev. denied, 123 Wn.2d 1030, 877 P.2d 695 (1994). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Pirtle, 127 Wn.2d at 572. "Some of the factors considered in determining whether the misconduct likely affected the verdict are whether the prosecutor was able to provoke the defense witness to say that the State's witness must be lying, whether the State's witness's testimony was believable and/or corroborated, and whether the defense witness's testimony was believable and/or corroborated." State v. Padilla, 69 Wn.App.at 301. A harmless error under the constitutional standard occurs if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 118 (1985) *cert. denied* 475 U.S. 1020 (1986).

Bondurant's claims that the question to her by the deputy prosecutor on cross examination asking her if the State's witnesses were just making up their testimony should not rise to the level of misconduct in this case. In the first place it is obvious this question by the prosecutor did not prejudice Bondurant since the main exchange which led up to the deputy prosecutor asking Ms. Bondurant, "so Deputy Spahn is just making all this up then?" involved the marijuana charge that she was *acquitted of*. RP Trial 132, 133, 134. Secondly, the deputy prosecutor asked this question because Ms. Bondurant's testimony was in direct contradiction to what the deputies say she originally told them. RP 27, 47, 124. In this way, the prosecutor's question was "a pertinent reply to" Bondurant's claim that she had not told the deputies that the pill container with the marijuana buds in it was hers. RP 27, 47. However, even if the deputy prosecutor's question was inappropriate, it should be considered harmless because the evidence in this case as to the remaining charges was overwhelming. Officers testified that a tube ("paraphernalia") with powdery residue (methamphetamine) was found in Ms. Bondurant's purse. RP Trial 21, 49, 50, 63,64, 71. Ms. Bondurant's purse had her identification in it. RP Trial, 46. The tubing was sent off for

analysis by the crime laboratory. RP Trial 24. The crime laboratory representative testified that the white residue found in the tubing contained methamphetamine. RP Trial 78,81.

As to the bail jumping offense, Ms. Bondurant agreed that she was not in court on November 2, 2006--the date alleged in the bail jumping count. RP Trial 124, 125. And a detective testified that the sets of fingerprints he examined were determined to be Ms. Bondurant's prints and there were numerous documents admitted as evidence of the bail jumping charge. RP Trial 94-98, 108, 109, 110. The foregoing evidence overwhelmingly supports the possession of methamphetamine, the use of paraphernalia and the bail jumping offenses. Because the evidence supporting these charges was overwhelming, the allegedly improper question by the prosecutor should be considered harmless here.

B. THE CHARGING LANGUAGE IN THE INFORMATION AS TO THE BAIL JUMPING CHARGE WAS SUFFICIENT.

Bondurant argues that the charging language in the information is not sufficient as to the bail jumping charge, claiming it did not inform her of an essential element of that offense. This argument is without merit.

A challenge to the sufficiency of the charging document is reviewed de novo. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). When a charging document is challenged for the first time on appeal, it must be construed liberally, "[t]hus, we need only determine if the necessary facts appear *in any* form in the charging document." State v. Williams, ___ P.3d ___, 2007 WL 3314805, at 3. When a defendant challenges an information after entry of a verdict, the reviewing court asks: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991) (emphasis added). The information does not need to state the statutory elements of an offense in the exact language of the statute, but may instead use words conveying the same meaning and import as the statutory language. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). "The rationale behind including 'essential elements' rather than only 'statutory elements' is to give the accused proper notice of the nature of the crime so that the accused can prepare an adequate defense." Williams, 2007 WL 3314805 at 2.

The bail jumping statute states that, "[a]ny person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping. RCW 9A.76.170(1). Bondurant argues that because the information did not allege that Bondurant had "knowledge of the requirement of a subsequent personal appearance," that this was error. Brief of Appellant, 6. Bondurant is incorrect.

In the first place, the Amended Information as to the bail jumping charge states:

...in that the defendant on or about November 02, 2006, in Lewis County, Washington, then and there, having been charged with POSSESSION OF A CONTROLLED SUBSTANCE, a class C felony. . . . POSSESSION OF MARIJUANA LESS THAN 40 GRAMS and UNLAWFUL USE OF DRUG PARAPHERNALIA, Misdemeanors, and having been released by court order and having been admitted to bail ***with a requirement of a subsequent appearance*** before the Lewis County Superior Court, did knowingly fail to appear as required

CP 18-19 (emphasis added). Secondly, here, the charging document is being challenged after the verdict. Therefore, it must be construed liberally. "Thus, we need only determine if the necessary facts appear *in any* form in the charging document."

Williams supra, 3. Accordingly, while the bail jumping charge in this case may have been phrased more precisely, this court should find that the charging document meets the liberal construction test. This language was sufficient to inform Bondurant that she was being charged with having failed to make a court appearance of which she had knowledge. CP 18-19; RCW 9A.76.170(1). Moreover, when we ask "do the necessary facts appear in any form, or by fair construction can they be found, in the charging document;?" Kjorsvik, supra, the answer is "yes." This is because the charging document has the words "having been admitted to bail with a requirement of a subsequent appearance" together with the words "did knowingly fail to appear as required." CP 18-19. Accordingly--contrary to how Bondurant interprets the sufficiency of these words-- under a liberal construction the language of the bail jumping statute does "appear in any form" in the charging document, and the language used certainly conveys notice to the defendant as to what conduct it is proscribing. CP 18-19; Kjorsvik supra. Furthermore, Bondurant cannot "show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991) (emphasis added). This is because it is readily

apparent that Bondurant "had notice of" what the charge was because she agreed that she missed the court date and that she knew she was supposed to be in court that day. RP Trial 124, 125, 126, 127 (Bondurant agreed that she had "signed a paper" saying she needed to be in court on November 2, 2006. RP Trial 126.) Bondurant further said she tried to call her attorney to explain why she was not in court that day. RP trial 127. Bondurant said she missed the court date because her brother was in the hospital and she had to call people to inform them about her brother's illness. RP Trial 127-129. And again on cross examination Bondurant admitted that she missed the court date alleged in the bail jumping charge. RP 129.

Because the "necessary facts appear in any form" in the charging document as to the bail jumping charge and because the charging language gave Bondurant adequate notice of the proscribed conduct, and because Bondurant has not shown that she was prejudiced by any alleged deficiency in the charging document, her claims are without merit and her bail jumping conviction should be affirmed.

C. THE "TO CONVICT" INSTRUCTION ON THE BAIL JUMPING CHARGE WAS PROPER.

Bondurant also claims error in the language of the "to convict" instruction as to the bail jumping charge. Bondurant claims that the jury instructions regarding her bail jumping charge were in error because the "court's instruction defining bail jumping made no reference to the charge underlying the bail jumping, and, she claims, did not inform the jury of the requirement that Ms. Bondurant be held for or charged with a felony." Brief of Appellant, 10. Bondurant also claims error in the court's "to convict" instruction because it "required proof that Ms. Bondurant 'was charged with Possession of a Controlled Substance,' but did not require the jury to find that Ms. Bondurant was charged with felony possession." Id. Bondurant is wrong.

The sufficiency of a to-convict instruction is reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Jury instructions are reviewed "in the context of the instructions as a whole," State v. Pirtle, 127 Wn.2d at 656. Failure to instruct on an essential element is automatic reversible error. State v. Pope, 100 Wn.App. 624, 628, 999 P.2d 51 (2000).

Bondurant's arguments regarding the bail jumping jury instructions are incorrect because Bondurant is improperly conflating the elements needed to prove guilt --which go to the jury--with factors regarding penalties, which go to the judge. "The penalty classification is relevant only to the sentence to be imposed on conviction, a topic the jury is not even permitted to consider in its deliberations." State v. Williams, ___ P.3d ___, 2007 WL 3314805, at p. 4 (2007) (citations omitted). Indeed, in this very recent Williams case, our Supreme Court rejected nearly identical arguments as now set forth by Bondurant. State v. Williams, ___ P. 3d ___, 2007 WL 3314805 (2007) abrogating State v. Ibsen, 98 Wn.App. 214, 989 P.2d 1184. The decision in the Williams case appears to decide the issues argued by Ms. Bondurant as to the bail jumping charge.

In Williams, the Court held that classification of the underlying crime was not an essential element of bail jumping that had to be included in the to-convict instruction. Id. Although the charges here are somewhat different than the exact charges in Williams, Bondurant makes essentially the same arguments that were rejected in Williams--i.e, that the class of the underlying felony is an essential element of bail jumping. But, as Williams makes

clear, the class of the underlying felony is not an essential element of this crime. Williams, WL 3314805 at 4, quoting State v. Williams, 133 Wn.App. at 716. In holding that the class of the underlying crime is not an essential element of bail jumping which needs to appear in the to-convict instruction, the Williams Court explained:

"[w]hile the penalties for bail jumping are divided into classes, the *crime* itself is not." Williams, citing Gonzalez-Lopez, 132 Wn.App. at 635. " Therefore, the classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge. In fact, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02 (2nd ed. 1994)(WPIC) prohibits jurors from considering punishment in their deliberations. Regarding the sufficiency of the information and to-convict instruction, 'the underlying crime merely establishes the penalty that may be imposed following a bail jumping conviction.'

Williams, at 4,5 (emphasis added) (and quoting Williams 133 Wn.App. at 721). As the Gonzales-Lopez court also explained, section (1) of RCW 9A.76.170 [bail jumping], "does not include within the elements defining guilt any reference to the provisions of section (3) of the statute, which defines the penalty classes of bail jumping." State v. Gonzalez-Lopez, 132 Wn. App. 622, 625-640, 132 P.3d 1128 (2006).

The reasoning of the recent Williams decision should be applied here and this Court should likewise hold that the to-convict instruction for the bail jumping charge in this case was proper because, as Williams instructs, the classification of the underlying crime is not an essential element that needs to appear in that instruction. Accordingly, this argument by Bondurant should be disregarded and her bail jumping conviction should be affirmed.

D. THE TO-CONVICT INSTRUCTION ON THE BAIL JUMPING CHARGE DID NOT VIOLATE *BLAKELY* OR *APPRENDI*.

Bondurant also claims that Blakely and Apprendi were violated by the language used in the to-convict instruction pertaining to the bail jumping charge. The to-convict instruction was held to be sufficient by the Williams Court in that the underlying offense is not a necessary element in the to-convict instruction, as previously discussed. Bondurant's Blakely argument regarding the to-convict instruction makes a very similar claim, stating that the to convict instruction "permitted conviction based on Ms. Bondurant's marijuana charge." Brief of Appellant at 10. Again, the jury here *acquitted* Ms. Bondurant of the possession of marijuana charge.

The Williams case also discussed and rejected a similar Blakely argument with regard to the to-convict instruction in a bail jumping charge. Bondurant's Blakely argument should likewise be rejected. State v. Williams, supra (2007 WL) commented as follows about the to-convict instruction and Williams' Blakely challenge:

There is no [Blakely/Apprendi] violation because [the defendant's] . . . sentence. . . is not , , , the maximum sentence that the judge could impose based on the facts proved to the jury. . . . Here, Williams fails to satisfy the threshold condition of Apprendi that the actual sentence imposed be longer than the maximum sentence for the crime for which a defendant has been validly convicted. Williams received the lowest possible sentence recommended by the sentencing guidelines. We find no violation of Apprendi or Blakely in the current case.

Williams,6,7 (internal citations omitted). Bondurant's sentencing range in this case on the bail jumping conviction was 9-12 months. 04/04/07 RP 179. As in Williams , Bondurant was sentenced to the *low end* of that range. 04/04/07 RP 182. Since the to convict instruction has been found proper in Williams and because Bondurant received the "lowest possible sentence recommended by the sentencing guidelines" for the crimes she was actually convicted of, the State does not see how Bondurant meets even the "threshold condition of Apprendi " and this claim, too, should be

disregarded. In other words, "[t]he classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge to be determined by reference to the statutes classifying each crime. Nothing in Apprendi requires that the jury make the classification determination. State v. Williams, 133 Wn.App. 714, 717-722, 136 P.3d 792 (2006), *review granted* 159 Wn.2d 1015, 157 P.3d 404 (2007), *affirmed* ___ P.3d ___, 2007 WL 3314805 (2007). Bondurant's Blakely/Apprendi argument fails and her conviction should be affirmed.

CONCLUSION

The Prosecutor did not commit misconduct during cross-examination of Ms. Bondurant, but even if such questioning was improper, any error was harmless because the evidence in this case was overwhelming. Nor were the charging document or the to-convict instruction insufficient, nor was there any Blakely/Apprendi violation as to the bail jumping conviction, pursuant to the ruling in the recent Williams case. Accordingly, Ms. Bondurant's convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 26 day of November, 2007.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

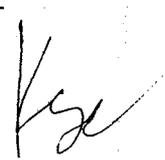
by:

A handwritten signature in cursive script, appearing to read "Lori Smith", written over a horizontal line.

Lori Smith, Deputy Prosecutor
WSBA 27961

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO. 36134-5-II
Respondent,)	
vs.)	
)	
PHYLLIS BONDURANT,)	
Appellant.)	DECLARATION OF
_____)	MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County, 
Washington, declare under penalty of perjury of the laws of the
State of Washington that the following is true and correct: On
November 26, 2007, I mailed a copy of the Respondent's Brief by
depositing said documents in the United States Mail, postage pre-
paid, to the attorney for the Appellant at the name and address
indicated below:

Backlund and Mistry
203 East 4th Avenue, Suite 404
Olympia, WA 98501

DATED this 26 day of November, 2007, at Chehalis,
Washington.



Lori Smith, WSBA 27961
Lewis Count Prosecutor's Office
340 NW North Street MS:PRO01
Chehalis, WA 98532-1900

Declaration of
Mailing